Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1997

DAVID E. WRIGHT and MYRNA WRIGHT, dba F/V A.A. BARANOV; CHARLOTTE NORADOUN and EDWARD RUNYON d/b/a F/V SEA PEARL; and DALE R. KENT and LADY CECELIA, INC.,
Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE,
Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

David E. Wright and Myrna Wright, dba F/V A.A. BARANOV; Charlotte Noradoun and Edward Runyon d/b/a F/V SEA PEARL; and Dale R. Kent and Lady Cecelia, Inc. made applications to the respondent agency, the National Marine Fishery Services, for a limited entry fishery permit. Their applications were denied. The applicants filed suit in the federal district court seeking establishment of constitution property rights and challenged the regulations which excluded them from the fishery.

The district court denied constitutional protections. The appellate court denied jurisdiction to challenge the regulations. The question presented here is:

Whether preexisting and active commercial fishermen and fishers who are being selectively excluded from the fishery under a newly created federal fishery program have any constitutional property rights to cross-examine and confront witnesses against them and offer rebuttal testimony and evidence to agency findings of non-eligibility, and to otherwise challenge the regulations which are excluding them from the fishery?

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PETITION FOR WRIT OF CERTIORARI

David E. Wright and Myrna Wright, dba F/V A.A. BARANOV; Charlotte Noradoun and Edward Runyon d/b/a F/V SEA PEARL; and Dale R. Kent and Lady Cecelia, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 25, 1997 (Wright, No. 95-35964; Noradoun, No. 95-35963; and Kent, No. 96-35048), in order to exercise this Court's supervisory power.

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OPINIONS BELOW

The opinions of the Unites States Court of Appeals for the Ninth Circuit that gives rise to this petition is unpublished by order of the Tenth Circuit and are reprinted in the Appendix attached. A companion case, not appealed, and decided by the Ninth Circuit and ordered to be published, *Norbird Fisheries, Inc., dba Ptarmigan F/V v. National Marine Fisheries Services, No. 95-36130*, and relied on by the Ninth Circuit which to denied the sought relief, is reprinted in the Appendix.

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JURISDICTION

The Western District Court for the District of Washington issued decisions rejecting David E. Wright

and Myrna Wright, dba F/V A.A. BARANOV; Charlotte Noradoun and Edward Runyon d/b/a F/V SEA PEARL; and Dale R. Kent and Lady Cecelia, Inc. petitions, respectively. The respective parties timely filed notice of appeals to the Ninth Circuit, which affirmed the decisions on April 25, 1997. Pursuant to 13.1, this petition has been filed within 90 days of the entry of the judgments.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVE IN THIS CASE

16 U.S.C. § 1855(d), provides:

> Regulations promulgated by the Secretary under this chapter shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated; except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside any such regulation on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

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Section 16 U.S.C. § 1861(d) provides:

> The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter. In the case of Guam, and any Commonwealth, territory, or possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the District of Guam, except that in the case of American Samoa, the appropriate court is the United States District Court for the District of Hawaii. Any such court may, at any time-
>
> (1) enter restraining orders or prohibitions
> (2) issue warrants, process in rem, or other process;
> (3) prescribe and accept satisfactory bonds or other security; and
> (4) take such other actions as are in the interests of justice.

STATEMENT OF THE CASE

Petitioners filed suit against National Marine Fisheries Service ("the agency") seeking review of a decision by the agency denying a limited entry permit to participate in the Pacific Coast groundfish fishery under the Magnuson Fishery Conservation and

Management Act, 16 U.S.C. § 1801 et seq., and implementing regulations at 50 C.F.R. § 663.30 - .43 (1994).

The District Court denied summary judgment to the fishers and granted summary judgment to the agency. The Ninth Circuit affirmed. The lower courts ruled the agency did not act arbitrarily and denied the fishers' motion to recognize constitution property rights to a reasonable expectation of continued commercial fishing.

The limited entry program restricts commercial fishing for groundfish off the Pacific Coast unless the vessel or owner possesses a federal groundfish permit. This new federal program took effect on January 1, 1994. 57 Fed. Reg. 32,500 (July 22, 1992). The goal is reducing the harvesting capacity of the groundfish fishing fleet by reducing the number of fishing vessels.

Groundfish are also called "bottom fish." These species of fish include red snapper, rock, cod and sole fish. These fish tend to gather near the ocean floor. A "trawl" net is a long weighted net lowered from a large net wheel placed at the end of the vessel. This net is designed in a bag shape and is pulled (or dragged) along or near the bottom of the ocean typically one, two or more miles deep. The term dragging is often used in place of trawling.

The primary purpose of the Magnuson Act was to extend U.S. offshore jurisdiction to 200 miles and prohibit foreign fishing vessels without U.S. permits. At the same time Congress gave authority to the

Secretary of Commerce to "limit access" to fishing by domestic vessels. 16 U.S.C. § 1853(b)(6).

There is no legislative history by Congress or its conference committees directly the Secretary of Commerce to issue regulations excluding current participating fishing families from the fishery. CONGRESSIONAL RESEARCH SERVICE, *A Legislative History of the Fishery Conservation and Management Act of 1976 Together with Section-By-Section Index*, (U.S. Library of Congress, 1976).

The Magnuson Act only reads, that the Fish Management Councils have discretion to "establish a system for limiting access to the fishery in order to achieve optimum yield ..." 16 U.S.C. § 1853(b)(6).

The legislative history is primarily concerned with foreign vessels. For instance, Senator Magnuson states well into the debate over the proposed Act:

> A person can off the coast of my State of Washington on a clear day, or get on a bluff on the far northwest corner, and look upon 200 or 300 fishing boats belonging to the Russians or Japanese. The Polish ships are in there now. China has started. South Koreans fish off our shores with boats we gave them after the war and which have been converted into fishing fleets. There are just no fish remaining.

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CONGRESSIONAL RESEARCH SERVICE, *A Legislative History of the Fishery Conservation and Management Act of 1976 Together with Section-By-Section Index*, (U.S. Library of Congress, 1976), Page 545.

The Pacific Coast Groundfishery is the first and only fishery which the federal government has implemented a limited entry program that excludes participating fishing families.

With the exception of the recent fish management plan for the North Pacific's sablefish and Pacific halibut fisheries under, 50 C.F.R. §§ 676.10-676.25, 58 FR 59402, Nov. 9, 1993 (as discussed and recently affirmed in Alliance Against IFQs v. Brown, 84 F.3d 343, 345 (9th Cir. 1996)), the other federal fishing permit and fish management plans do not deny access to participating fishing families. Atlantic Groundfish Fishery Management Plan, 50 C.F.R. § 651.4; Atlantic Surf Clam and Ocean Fisheries Management Plan, 50 C.F.R. § 652.4; and Tanner Crab Fishery Management Plan, 50 C.F.R. § 671.23.

Eligibility for a limited entry permit is determined by the extent of a vessel's participation in the fishery during a "window period" between July 11, 1984 and August 1, 1988. Four types of endorsement are available for each of three gear types: "A," "provisional A," "B," and "designated species B." In order to qualify for an "A" endorsement, which is the only unconditional, freely transferrable endorsement, a vessel must have satisfied certain minimum landing requirements ("MLRs") for groundfish during the window period. A "provisional A" endorsement may

be obtained under some circumstances for a vessel which was being constructed or converted during the window period. 57 FED. REG. 54006, et. seq.

The "provisional A" endorsement may then be upgraded to an "A" endorsement if specific landing requirements are met for three consecutive years beginning on the date of the first landing of any species of fish after the conversion began. The "provisional A" endorsement is nontransferable and expires at the end of any upgrade period in which the upgrade criteria are not met. Id.

Under certain circumstances a hardship exception due to injury or illness is applicable if the vessel has not complied with the requirements for an "A" endorsement or satisfied the upgrade criteria.

In addition, to qualify for a hardship exception, the permit applicant must prove that the failure to satisfy the requirements was caused by one of several enumerated conditions. These conditions include construction or conversion delays beyond the control of the vessel owner. Id.

The regulations were first published in 1992 and made effective December 31, 1994. The criteria for continued fishing rights and the grant of a perpetual limited entry permit is solely based on facts and circumstances existing between July 1984 and 1990.

The agency determined the fisherman did not meet its retroactive criteria. The agency's decisions on legal and factual findings made without rights of

confrontation and rebuttal should be ruled arbitrary or not in accordance with procedural fairness.

In each of the fishers' cases, the Wrights, Noradoun and Runyon, and Kent and Lady Celelia, the fishers argued for constitution protections of confrontation and rebuttal testimony and evidence to correct agency's misunderstandings, application of facts, or decision-making.

REASONS FOR GRANTING THE WRIT

Unlike past cases arising under the Magnuson and brought by fishing groups or fish associations challenging the federal government's industry-wide regulations such as annual harvest quotas or dates of fishing.

This petition concerns cases of total exclusion of active fisherman.

The only difference between those who received permits and those who did not was random satisfaction of retroactive regulations. The deferential agency review action of industry-wide Magnuson Act cases should not be used to summarily exclude active fisherman, especially where constitutional protection of confrontation and rebuttal would have meant the fisherman would not be summarily excluded.

Some industry-wide Magnuson Act cases implementing deferential review are Washington Crab

Producers, Inc. v. Mosbacher, 924 F.2d 1438 (9th Cir. 1990)(commercial fishing groups challenging Magnuson Act annual quotas and harvest plan); and Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456 (9th Cir. 1987)(challenge to federal government's Alaska Groundfish Plan regarding annual quotas).

Other industry-wide regulation cases affecting the industry members as a group (and not excluding some participating fishermen to the benefit of others) are: Organized Fishermen of Florida v. Hodel, 775 F.2d 1544 (8th Cir. 1985)(commercial fishermen seeking declaratory relief regarding National Park's rules limiting the number of fish per species that can be caught and prohibiting all commercial fishing in the park); Parravano v. Babbitt, 861 F.Supp 914 (N.D. Calif. 1994)(commercial fishing associations challenging a reduction in the annual quota for a single fishing season); Vietnamese Fisherman Ass'n of America v. Calif Dept of Fish and Game, 816 F. Supp. 1468 (N.D. Calif. 1993)(prohibition of commercial fishing gill nets by State of California); and Burns Harbor Fish Co. v. Ralston, 800 F. Supp. 722 (SD Indiana 1992)(challenge on due process claims regarding banning of gill nets by commercial fisherman by State of Indiana in the Lake Michigan waters).

The District Court in this case and the related cases specifically rejected constitutional rights of confrontation and rebuttal.

The exclusion of this fisherman from continued commercial fishing by government regulation is not akin to cases upholding exclusion of new entrants into

an industry based on a rational basis to a state purpose. City of New Orleans v. Duke, 427 U.S. 297 (1976)(exclusion of new push carts in New Orleans French Quarter) and Ocala Kennel Club, Inc. v. Rosenberg, 725 F. Supp 1205 (M.D. Florida, 1986)(exclusion of greyhound racing track permits to new applicants inside certain areas).

The regulations give vast discretion to the agency to make factual determinations that are generally outside the scope of the agency's expertise. The agency's approach to the limited entry application is adjudicatory in nature. For example the agency is asked to make substantive decisions on whether an illness or injury constitutes grounds of a hardship exception.

This decisions in this case and the related cases do not involve the agency's expertise regarding fish stocks, weather forecasts, ocean currents, data collection or any other agency expertise. The agency on one hand is an opposing party and on the other is the judge. The result is an undeniable loss of procedural fairness.

A fishing vessel owner is not unlike a farmer, who has invested not only in land, but machinery. The investment of machinery makes the land more valuable, and the federal government in its Crop Reserve and Soil Conversation Programs or cattle and milk diversion programs, is not able to exclude farmers without buy-out of herds or cash payment for farmers to set aside land for conservation reasons.

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Without the fisherman's investment in the machinery of groundfishing, the fish resource would not have developed to the level where it has become a demanded food stuff for U.S. and world-wide consumers. The government would not today be seeking to conserve this resource for the nation's current and future citizens but for investment of time and money by persons like this fisherman.

No person shall be ... deprived of life, liberty or property, without due process of law. U.S. CONST. amend. V, § 4. While the right to pursue a vocation or occupation is not a fundamental right, a state or the federal government cannot exclude a participating commercial fishers from a fishery in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. New York State Trawlers Ass'n v. Jorling, 16 F.3rd 1303 (2nd Cir. 1994)(trawl fishing boats excluded as a group and class by the State of New York from catching lobsters within state waters)(citing Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S.Ct. 752, 755-56, 1 L.Ed.2d 796 (1957)).

The Second Circuit in New York Trawlers Ass'n v. Jorling, while ruling against the class of excluded vessel owners and fishers, contemplated that constitutional protection may be necessary if government exclusion was applied selectively against individual fishers or owners.

Individual constitutional protection to commercial fishers must be recognized under this federal limited entry program. Under this program the federal

government has selected criteria to favor some fishing families and vessel owners over others.

A commentator on the constitutional requirements of limited entry systems under the Magnuson Act believes the U.S. Supreme Court will find a liberty interest in fishers who may be denied permits. Koch, *A Constitutional Analysis of Limited Entry*," Limited Entry as a Fishery Management Tool, Proceedings of a Nat'l Conference to Consider Limited Entry as a Tool in Fishery Management (Univ. of Washington Press, 1978.) Citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), at page 257, footnote 31, Mr. Koch states:

> The interest at stake in the implementation of a limited access system is likely to be the "liberty" interest protected by the due process clause.... although the Court has not assumed to define `liberty' with any great precision, that term is not confined to mere freedom from bodily restraint." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Because the Court has found that "liberty" encompasses one's justifiable expectation of continued entitlement of employment, Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957); Slochower v. Board of Education, 350 U.S. 551 (1956), it is likely that fishermen, facing exclusion from participating in a particular fishery, would be deemed to have an affected liberty

> interest. Also compare Perry v. Sindermann, 408 U.S. 593 (1972), with Board of Regents v. Roth, 408 U.S. 564 (1972).

Because the federal government has selected a limited entry program that permits transfers at any price, the value of fishing permits is very significant. Permits have been found to be attachable and are entitled to a degree of constitutional protection against unreasonable seizure. *A Taxing Issue: Are Limited Entry Fishing Permits Property?* 9 ALASKA L. REV. 93 (1992)(discussing Lorentzen v. U.S., No. A90-446 Civil (D. Alaska, Mar. 11, 1992) regarding IRS's seizure of an Alaska salmon permit under the Alaska Limited Entry Act, ALASKA STAT. § 16.43). See also: Young, *Fishing by Permit: Restricted Common Property in Practice*, 13 OCEAN DEV. AND INT'L L. J. 121 (1983)(discussing wind-fall type profits going to initial distributees who intend to sell limited entry permits).

As Mr. Koch stated in his constitutional analysis of an eventual limited entry program under the Magnuson Act, should the government ever actually institute such a drastic program:

> [I]f the criteria used to determine participation involve the use of judgment or "individualized determinations," procedural due process would require some type of hearing "at a meaningful time" and "in a meaningful manner." It is likely that there may be some such

cases should provisions be included in the entry regulatory scheme that would consider the "cultural and social" impact of access denial, an individual's "dependence on the fishery," and other such standard that do not easily admit of mechanical application. The number of such cases might be minimized either by trying to incorporate such factors in mechanical standards, or by "screening" persons eligible for such consideration through a set of mechanically applied standards; however, because the FCMA directs that such factors be considered in establishing an access limitation system, they must be taken into account in some manner. ...

Because individualized determinations would turn on disputed questions of fact, the only "meaningful" type of hearing would be an adversary-type hearing. This does not necessarily encompass a requirement for formal procedures, for a particular order of proof, or a particular mode of offering evidence. (See also Dixon v. Love, 97 S. Ct. 1723 (1977); Mathews v. Eldridge, 242 U.S. 319, 343 (1976)) However, the Supreme Court has stated: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . ." (Goldberg v. Kelly, 397

> U.S. at 269). In sum, while the specific minimum due process requirements cannot be specified in the absence of a concrete example, the hearing requirement is most likely to require, in case of disputed individualized determinations of fact, an opportunity for a fisherman who is being denied access to fishery to present his case orally, with some sort of "cross-examination" right, before a fact-finding tribunal. One should note that because the requirements of procedural due process are largely the result of a balancing of private versus government interest, an established fisherman denied access should be afforded more procedural protection (because he has more to lose) than someone trying to enter the fishery anew.

(Koch, *A Constitutional Analysis of Limited Entry*, Limited Entry as a Fishery Management Tool, *infra* at Page 258.)

These fishers are not potential entrants into a closed fishery. Their life depends in large part on their continued commercial fishing of groundfish without total governmental exclusion.

The Ninth Circuit did not entertain or consider the petitioners' arguments of constitutional protection on the basis that statutory jurisdiction under 16 U.S.C. § 1855(d), which governs review by U.S. District Courts of challenges to regulations under Magnuson Act.

Section 1855 addresses the implementation of fishery management plans and 1855(d) provides that:

> Regulations promulgated by the Secretary under this chapter shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated; except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside any such regulation on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

The Ninth Circuit ruled jurisdiction over the claims of constitution protection and challenges to the regulations was not available under § 1861 of the Magnuson Act. Section § 1861 of the Magnuson Act specifically allows preliminary relief on "cases and controversies arising" under the Magnuson Act.

Section 16 U.S.C. § 1861(d) provides:

> The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter. In the case of Guam, and any Commonwealth, territory, or possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the

> District of Guam, except that in the case of American Samoa, the appropriate court is the United States District Court for the District of Hawaii. Any such court may, at any time-
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> (1) enter restraining orders or prohibitions
> (2) issue warrants, process in rem, or other process;
> (3) prescribe and accept satisfactory bonds or other security; and
> (4) take such other actions as are in the interests of justice.

The Ninth Circuit relied on the companion and published case of Norbird Fisheries, Inc., dba F/V Ptarmigan v. The National Marine Fisheries Service, ___ F. Supp. ___ (9th Cir., April 25, 1997):

> Regulations promulgated by the Secretary under the Magnuson Act are "subject to judicial review" in accordance with the Administrative Procedure Act, 5 U.S.C. § 1855(f)(1). A separate section of the Magnuson Act confers jurisdiction on the district court "over any case or controversy arising under the provisions of this chapter." 16 U.S.C. § 1861(d). This provision is to be read in conjunction with the provision governing judicial review of the regulations. That provision, § 1855(f)(1), deprives the district court of jurisdiction to hear an

attack on the regulations if review is not sought within 30 days of their promulgation. Kramer v. Mosbacher, 878 F.2d 134, 136-37 (4th Cir. 1989). Consequently, it was too late for Norbird to raise its challenges to the regulations in the district court.

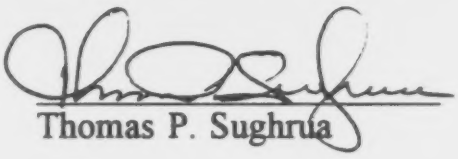
Although Mr. Mattson did not join the other fishers as petitioners, the petitioners challenge the Ninth Circuit's application of § 1861 and § 1855. Their grounds for challenging the regulations did not arise until the application process under the limited permit regulations.

While Congress under Section § 1855(d) prohibited judicial review on the implementation or promulgation of Magnuson Act regulations (which includes fishing season opening and closing dates and setting of season quotas), it Congress surely did not intend to prohibit a wrongfully denied fisher an opportunity to redress in Court a mistake or misunderstanding by the fishery agency. Likewise, Congress could not have intended to prohibit a fisher's opportunity to raise a challenge to the regulations as applied within the application process, or to present a challenge on basis of constitution protection.

CONCLUSION

Acceptance of a writ of certiorari will enable the court to consider constitution protection for preexisting

and active commercial fishermen and fishers who are being selectively excluded from a fishery under a newly created federal fishery program. These fishers are entitled to fairness of procedure through rights of cross-examination, confrontation of witnesses against them, and the ability to offer rebuttal testimony and evidence.



Thomas P. Sughrue

APPENDIX

APPENDIX A

NOONAN, Circuit Judge:

Norbird Fisheries, Inc. (Norbird), brought suit challenging the denial of a limited entry permit to the Pacific Coast Groundfish Fishery (the Fishery) by the National Marine Fisheries Service (NMFS). The district court granted summary judgment to NMFS. Norbird appeals. Holding, that Norbird's challenge to NMFS's regulations came too late so that jurisdiction to review was barred by 16 U.S.C. § 1855(f)(1) and that the application of the regulations was not arbitrary, we affirm the judgment of the district court.

FACTS

The Qualifying Vessel

The relevant facts as they appear in the administrative record are these: The vessel that Norbird put forward as the qualifying vessel was named the Taasinge and prior to the fall of 1981 was owned by Allen Larsen and was used to drag for groundfish until it was substantially destroyed by fire. On September 22, 1981 George Moskovita bought the hull from Larsen and the insurance company which had paid the claim for the fire loss. Over the next five years Moskovita personally rebuilt seventy-five percent of the boat, preparing it for dragging, and shrimping. On August 14, 1986 he sold it to John Cherrett.

Cherrett completed the rebuilding, renamed the boat the Ptarmigan, and on July 21, 1987, began to use it for shrimping. On September 1, 1988 Cherrett sold it to Robert Allen, subject to a mortgage. Allen used the boat for shrimping, for the next two months, thereafter Allen used it for dragging. In 1990 Cherrett repossessed the Ptarmigan from Allen, and it was sold at a U.S. Marshal's sale on July 19, 1990 to Dick Mattson. president of Norbird. On July 27, 1990, Mattson conveyed the boat to Norbird. For the rest of the shrimp season, until October 31, 1990. Norbird used the Ptarmigan for shrimping. In January, 1991. Norbird began to use the boat to drag for groundfish with trawl gear. Four months later, in April 1991, the Ptarmigan sank.

One might well conclude that the sinking of this unfortunate ship ended this case before it began. But Norbird salvaged some -groundfish gear and machinery and placed it on its other vessel, the Capt. F.V. Nielsen (Nielsen). Prior to 1991 the Nielsen had not fished in the Fishery.

The Limited Entry Program

Under the Magnuson Fishery Conservation and Management Act of 1976 (Magnuson Act), 16 U.S.C. § 1801 *et seq.*, the Pacific Fishery Management Council (the Council) manages all fisheries in the waters of the Pacific Ocean between 3 and 200 miles offshore of the states of California, Oregon and Washington. On August 4. 1988, the Council announced that it was considering, a limited entry program for the Fishery and that eligibility to obtain a

limited entry permit might be determined on a vessel's record of participation in the fishery during the window period of July 11, 1984 to August 1, 1989. 53 Fed. Reg. 29338 (August 4, 1988). The Secretary of Commerce approved of the limited entry program and issued proposed regulations on July 22, 1992. 57 Fed. Reg. 32,499-511 (July 22, 1992). The purpose of the cutoff date, the Secretary explained, was "to prevent further overcapitalization of the fishery by discouraging persons from entering the fishery only on the speculation that they might qualify for a valuable permit that could later be sold for a profit." *Id.* at 32,502. The program became effective on January 1, 1994, 50 C.F.R. 663.30(b).

Participation in the limited entry program requires that the vessel have a limited entry permit with a gear endorsement for the trawl gear being used to fish. 50 C.F.R. § 663.33(a). To qualify for an entry permit with the "A" endorsement, the only unconditional, freely transferrable endorsement, a vessel must meet specified Minimum Landing Requirements (MLRs) of groundfish using specified gear during the window period of 1984-1988. 50 C.F.R. § 663.34. Hardship exceptions are available for vessels not qualifying under the general rules. The exception that Norbird urged as relevant was when "[construction or conversion criteria are not met due to delay(s) beyond the control of the vessel owner." 50 C.F.R. § 663.38(b). No hardship exception is available when the vessel fails to meet the MLRs during the window period for economic reasons. 50 C.F.R. § 663.38.

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PROCEEDINGS

On June 23, 1993, almost a year after the Secretary of Commerce's approval of the program through the issuance of proposed regulations, Norbird applied for a limited entry permit for the Nielsen, which it put forward as the replacement of the Ptarmigan, alleged by it to be the qualifying vessel. The Chief of the Fisheries Management Division denied the application. Norbird appealed to the NMFS Regional Director and sought a hearing before the Council's Permit Review Board (the Board). The Board, composed entirely of fishermen, recommended against granting a hardship exemption. The Regional Director, independently reviewing the record, concurred.

On June 17, 1994, Norbird brought this action in the district court. Norbird asserted in Count One that it qualified under the hardship exception; in Count Two that it had not received notice of the requirements of the regulations; and in Count Three that the regulations violated the Magnuson Act and that denial of the permit constituted "a taking of plaintiffs' livelihood and property without due process of law." On cross-motions for summary judgment, the district court held that the action of NMFS had not been arbitrary and that Norbird's challenge to the regulations was barred by the 30 days statute of limitation set by the Magnuson Act, 16 U.S.C. § 1855(f)(1) (formerly § 1855(b)(1)). The court entered judgment for NMFS. Norbird appeals.

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ANALYSIS

[1] *The Challenge To the Regulations.* Regulations promulgated by the Secretary under the Magnuson Act are "subject to judicial review" in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, "if a petition for such, review is filed within 30 days after the date on which the regulations are promulgated." 16 U.S.C. § 1855(f)(1). A separate section of the Magnuson Act confers jurisdiction on the district court "over any case or controversy arising under the provisions of this chapter." 16 U.S.C. § 1861(d). This provision is to be read in conjunction with the provision governing judicial review of the regulations. That provision, § 1855(f)(1), deprives the district court of jurisdiction to hear an attack, on the regulations if review is not sought within 30 days of their promulgation. *Kramer v. Mosbacher,* 878 F.2d 134, 136-37 (4th Cir. 1989). Consequently, it was too late for Norbird to raise its challenges to the regulations in the district court.

The Application of the Regulations. We will reverse NMFS's denial of the permit only if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accord with the law. *See Alliance Against IFQs*, 84 F.3d 343, 345 (9th Cir. 1996).

[2] The hardship exception to which Norbird appeals is construction or conversion delay "beyond the control of the vessel owner." 50 C.F.R. § 663.38. From 1981 to 1987 the successive owners of the Ptarmigan, Moskovita and Cherrett, were the persons who delayed rebuilding the boat. The delay was due to

them, not factors beyond their control. The hardship exception was inappropriate.

AFFIRMED.

APPENDIX B

(This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID E. WRIGHT and MYRNA WRIGHT, dba F/V A.A. BARANOV
Plaintiffs - Appellants
v.
NATIONAL MARINE FISHERIES SERVICE
Defendant - Appellee

No. 95-35964
DC No. CV-94-00923-CRD

Appeal from the United States District Court for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted December 9, 1996
Seattle, Washington

Before: Noonan, Thompson, and Kleinfeld, Circuit Judges.

David E. Wright and Myrna Wright (the Wrights) appeal the judgment of the district court in their action

seeking a limited entry permit from the National Marine Fisheries Service (NMFS) under the Magnuson Act, 16 U.S.C. § 1801 et seq. We affirm the judgment of the district court.

The Wrights raise challenges to the regulations of the NMFS, including their exclusion of catches of California halibut made using large mesh nets from qualifying groundfish landings under the limited entry permit program. Their complaint, however, was filed in the district court on June 17, 1994, well after the 30-day period following the regulations' promulgation in which Congress has mandated such challenges must be brought. See 16 U.S.C. § 1855(f)(1). The statute bars our consideration of these challenges. Norbird Fisheries, Inc. v. National Marine Fisheries Serv., No. 95-36130 (9th Cir. filed Apr. 25, 1997).

AFFIRMED.

APPENDIX C

(This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLOTTE NORADOUN and; EDWARD RUNYON dba F/V SEA PEARL,
Plaintiffs - Appellants
v.
NATIONAL MARINE FISHERIES SERVICE,
Defendant - Appellee,
No. 95-35963
DC No. CV-95-00077-WLD

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted December 9, 1996
Seattle, Washington

Before: NOONAN, THOMPSON, AND KLEINFELD,
Circuit Judges.

Charlotte Noradoun and Edward Runyon (appellants) appeal the district court's order granting summary judgment in favor of the National Marine Fisheries

Service (NMFS). We affirm the judgment of the district court.

FACTS

Charlotte Noradoun purchased the Sea Pearl, a Gulf of Mexico shrimping vessel, on July 13, 1987, in Florida and sailed it to Washington. On April 18, 1988, she conveyed a one-half interest to her father, Charlie Adams. Adams conveyed his one-half interest to Edward Runyon and John Kochis on December 23, 1988. Noradoun and Runyon married some time after December 23, 1988. At some point Kochis conveyed his interest to either Runyon or Noradoun and Noradoun conveyed part of her interest to Runyon; as of May 14, 1990, Runyon owned 99 percent of the Sea Pearl and Noradoun owned one percent.

Noradoun claims she intended to convert the Sea Pearl to a groundfish trawling vessel when she sailed it to Washington. During June or July of 1988, Noradoun orally ordered nets and doors. There is conflicting evidence of the purpose of that equipment. Runyon stated at a hearing before the Permit Review Board (Board) that Noradoun ordered trawl doors. A declaration from the vendor states that the order was for trawl gear. A suit filed against Adams and Noradoun by Pierre Marchand, who had guaranteed the purchase, states that the order was for shrimp trawls. A receipt issued at the time reveals Noradoun ordered doors but does not specify the type of doors. A payment of $4,400 was made on August 12 or 19, 1988. Appellants claim that conversion began in 1987 and ended in 1989.

Landing records reveal that the Sea Pearl fished for shrimp from May 27, 1988 through August 30, 1989 and regularly and exclusively for groundfish after May 25, 1990.

Appellants filed for a limited entry permit in the Pacific Coast Groundfish Fishery and claimed eligibility for a "provisional A" endorsement under the conversion criteria and the hardship exception. The Chief of the Fishery Management Division (Chief) denied the permit. Appellants appealed to the NMFS Regional Director (Director) and requested a hearing before the Permit Review Board (Board). After accepting additional evidence and conducting a hearing, the Board voted unanimously to deny the permit. Before the Director issued his decision, appellants submitted additional evidence, including a report by Barbara Milam, M.S.W., in which Milam concluded Noradoun suffered from depression and Dependent Personality Disorder because she was dominated by her abusive and alcoholic father, Adams, who owned half of the boat during the 1988 season. Milam concluded that Noradoun's condition caused the delay in conversion. NMFS also received two calls from Kochis during this period in which Kochis questioned appellants' hardship claim. The Director denied the permit.

Appellants filed this action seeking review of the NMFS's denial of their permit application. They alleged the denial was arbitrary and capricious and violated their procedural due process rights. They also claimed the regulations took a property interest without sufficient notice. The district court granted summary

judgment to NMFS. Noradoun and Runyon appeal.

ANALYSIS

Appellants argue NMFS erred in denying them a limited entry permit with a "provisional A" endorsement for several reasons. We disagree. Appellants were not prejudiced by the calls from Kochis to Dr. Fricke because neither Fricke nor the Director relied on Kochis's statements and both the Chief and the Board denied the permit on other grounds before Kochis made the calls. As for appellants' argument that the Board and the Director failed to consider relevant evidence, we note that appellants bear the burden of proving eligibility for the permit and the evidence concerning the purpose of the June or July order for nets and doors is conflicting and unclear. In response to appellants' argument that the NMFS wrongly believed that the Sea Pearl needed to be converted for West Coast shrimping and therefore wrongly determined the purpose of the August, 1988 expenditures, we note that a careful reading of the memorandum written by NMFS general counsel Elizabeth Mitchell, upon which this argument relies, reveals that Mitchell's opinion was equivocal and was based on a statement made to her by Bill Robinson, the recipient of the memo.

In any case, appellants failed to satisfy other requirements for the limited entry permit they seek. Noradoun did not pay "earnest money of 10 percent or more of the value of the contract" before August 1, 1988 as required by 50 C.F.R. § 663.3S(a)(1)(i). Ownership of the Sea Pearl was transferred in

December, 1988, and again before May 14, 1990 contrary to 50 C.F.R. § 663.35(a)(1)(ii). The Sea Pearl made no qualified landings of groundfish during the upgrade period as required by 50 C.F.R. § 663.35(a)(1)(iv).

Appellants also argue that NMFS's conclusion that the Sea Pearl was "prosecuting vigorously a West Coast shrimp fishery," a statement NMFS denies making, was contrary to the evidence. We disagree. The Sea Pearl made landings of shrimp between May 27, 1988, and August 30, 1989. A declaration from Marchand, a fish processor in Washington, stating that the Sea Pearl was underutilized during that period because of Adams' poor management only goes to whether the Sea Pearl prosecuted a West Coast shrimp fishery "vigorously," not whether the Sea Pearl was involved in shrimping.

Finally, we agree with NMFS and the district court that appellants failed to qualify for a limited entry permit under the hardship exception, even if we assume Noradoun had the illness Milam diagnosed. The Sea Pearl fished for shrimp during 1988 when the alleged hardship occurred; failure to meet landing requirements because of the economic decision to fish for shrimp rather than groundfish is not a hardship under the regulations. 50 C.F.R. § 663.38. The argument that Adams prevented Noradoun from meeting conversion criteria sufficient to constitute "delay[] beyond the control of the vessel owner" fails because Adams and Noradoun co-owned the Sea Pearl during 1988 and appellants do not argue that Adams' behavior was beyond his control. NMFS's conclusion that there was no contemporaneous evidence of intent to participate in

the groundfish fishery finds support in the record. Even if the failure to begin conversion was caused by a hardship within the meaning of the regulations, appellants failed to qualify for a permit because ownership of the Sea Pearl changed between August 1, 1988, and the date of permit application, a change appellants do not argue was caused by hardship.

Appellants also raise substantive challenges to the regulations under which their permit was denied. Because their challenge was not brought within the jurisdictional limit Congress has established, 16 U.S.C. § 1855(f)(1), we do not address their challenges. *See Norbird Fisheries, Inc. v. National Marine Fisheries Serv.*, No. 95-36130 (9th Cir. filed Apr.25, 1997).

AFFIRMED.

APPENDIX D

(This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE R. KENT and LADY CECELIA, INC.,
Plaintiffs - Appellants
v.
NATIONAL MARINE FISHERIES SERVICE
Defendant - Appellee
No. 96-35048
DC No. CV-94-01741-BJR

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, Chief District Judge, Presiding

Argued and Submitted December 9, 1996
Seattle, Washington

Before: NOONAN, THOMPSON, AND KLEINFELD,
Circuit Judges.

Lady Cecelia, Inc. (LCI) and a shareholder, Dale R. Kent (collectively, claimants), appeal the district court's order granting summary judgment in favor of

the National Marine Fisheries Service (NMFS) and denying its motion for summary judgment. We affirm the district court's order.

FACTS

Kent purchased the Garibaldi Dry Dock Company (Garibaldi) in August or October, 1987, to build a 70-foot combination dragger/shrimper steel fishing vessel. After the purchase, Garibaldi began purchasing and constructing gear for the vessel to be constructed. The vessel itself was never constructed. Kent underwent surgery on his ear on October 3, 1987, and had complications related to his ear condition during the remainder of 1987 and 1988.

At some point, Kent entered into a partnership with his son-in-law, Bob Rebuth. Kent represented to NMFS's Regional Director (Director) in January, 1994, that he and Rebuth formed a partnership for the purpose of purchasing Garibaldi on October 28, 1987. The Director accepted this representation. Kent now claims that he alone purchased Garibaldi and that the partnership was formed after his surgery in October, 1987. Kent apparently made this assertion to the Permit Review Board (Board) in February, 1994. The installment note on the purchase of Garibaldi shows Kent as the sole debtor.

Rebuth purchased the Lady Cecelia, a Gulf of Mexico shrimping vessel, on September 29, 1989. Ownership of the Lady Cecelia had been transferred three times between July 6, 1988, and September 29, 1989, before being sold to Rebuth. Lady Cecelia was

converted to a dragging and shrimping vessel at Garibaldi using equipment and materials purchased when Kent contemplated constructing a new vessel at Garibaldi. Lady Cecelia made groundfish landings in the fishery beginning January 8, 1991. Rebuth transferred ownership of the Lady Cecelia to LCI on May 20, 1991. Kent represented to NMFS that he purchased the Lady Cecelia in October, 1989, and converted it.

Claimants applied for a limited entry permit with a "provisional All endorsement for Lady Cecelia. NMFS denied the permit because claimants had not purchased the Lady Cecelia by August 1, 1988, as required under the regulations. 50 C.F.R. 663.35(a). NMFS denied Kent's hardship claim based on his illness because Kent failed to submit medical evidence and in any case claimants failed to begin conversion before August 1, 1988. Claimants appealed and requested a hearing before the Board, claiming qualification under the conversion regulation because Kent and Rebuth purchased Garibaldi in October, 1987, intending to construct a vessel. Kent explained that Lady Cecelia was purchased after his health problems arose and he and Rebuth decided it was more reasonable to purchase a boat rather than construct one. Kent's son testified at the hearing that he and Rebuth decided to purchase a vessel and convert it for economic reasons after Kent's illness forced Kent to abandon his construction plans. The Board voted to deny claimants' permit because they found no evidence of hardship under the regulations, Kent's family members should have helped when Kent's illness became known, Lady Cecelia was not purchased until

after August 1, 1988, and the purchase and construction of gear by Garibaldi does not constitute conversion under the regulations.

The Director upheld the permit denial. He found that claimants did not meet the requirements for a "provisional A" endorsement during the window period. He also found that Kent's illness did not prevent the partnership of Kent and Rebuth from either constructing or purchasing and beginning conversion of a vessel before August 1, 1988.

Claimants filed this action against NMFS claiming they were entitled to a limited entry permit under the construction and conversion criteria and under the hardship exception such that NMFS's denial of a permit was arbitrary and capricious. They also claimed the denial violated their procedural rights of due process and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-213. Both parties moved for summary judgment. The district court granted NMFS's motion and denied claimants' motion. Claimants appeal the denial under the regulations and on due process grounds; they do not appeal the decision under the ADA.

ANALYSIS

Claimants argue the denial was erroneous because it was based on NMFS's erroneous conclusion that Kent and Rebuth formed a partnership at the time Garibaldi was purchased. We find no prejudicial error. Kent's representations regarding ownership were conflicting and there was evidence in the record to support the

NMFS's conclusion. Even assuming the partnership was not formed until after Kent's operation in October, 1987, the partnership existed for almost ten months during the window period of July 11, 1984, to August 1, 1988. The conclusion that Kent's illness did not prevent commencement of construction or purchase and commencement of conversion during the window period was not arbitrary or capricious.

Claimants also argue that the purchase of Garibaldi constituted commencement of construction for purposes of the regulations. NMFS concluded that "laying a keel" required more than purchasing a dry dock and purchasing and constructing equipment. That interpretation is not plain error or contrary to the plain language of the regulations and as such we will not overturn it. Even if purchasing Garibaldi and certain equipment later used in converting Lady Cecelia constituted commencement, Kent did not meet the other requirements for a "provisional A" endorsement. Lady Cecelia made no landings of groundfish before September 30, 1990, and ownership of Lady Cecelia was transferred between August 1, 1988, and the time a permit was issued. 50 C.F.R. § 663.35(a)(2). No hardship prevented claimants from meeting the landing requirement because Kent told NMFS: "Had I know[n] that you would undertake to arbitrarily and unilaterally come up with a moratorium date that fell earlier than our entry into the fishery. I would have moved quicker than I did." He stated, "Lady Cecelia could have been in operation within 30 days [of purchase] but not knowing of limited entry deadline extensive repair and conversions were made." There was no error.

Claimants also argue NMFS failed to accept Kent's evidence of his illness. NMFS could have accepted Kent's medical evidence and still concluded that his illness did not prevent claimants from meeting the construction or conversion criteria. There was no error.

Claimants also challenge the regulations for lack of due process. This district court action, filed November 23, 1994 came too late to meet the jurisdictional requirements. *See Norbird Fisheries, Inc. v. National Marine Fisheries Serv., No. 95-36160 (9th Cir. filed Apr 25, 1997).*

AFFIRMED.